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COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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Dear Mr. Hogan:

In accordance with your letter of November 3, 1971, and later agreements reached with your office, the General Accounting Office reviewed the formal enforcement procedures of the Department of Health, Education, and Welfare (HEW) under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) and the provisions of the Emergency School Assistance Program (ESAP) applicable to discrimination.

We selected a sample from those school districts which had had title VI and ESAP administrative proceedings instituted against them and reviewed the case files to determine whether HEW had applied its procedures on a consistent and uniform basis in carrying out its actions. We did not, however, make any judgments as to the merits of the cases reviewed. We also examined into the adequacy of the coordination between the HEW Office for Civil Rights (OCR), which is responsible for the title VI compliance program, and the HEW Office of Education (OE), which is responsible for administering ESAP.

On the basis of the cases reviewed, we believe that HEW generally has complied with applicable laws and its regulations, policies, and procedures in administering formal enforcement proceedings under title VI and under ESAP. We believe also that adequate procedures exist for coordination between OCR and OE in title VI and ESAP administrative proceedings.

BACKGROUND

Provisions under title VI

Title VI of the Civil Rights Act of 1964 states that no person in the United States shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any federally assisted program or activity on the basis of race, color, or national origin. The act authorizes and directs each Federal department and agency which is empowered to extend--by way of grant, loan, or contract, other than a contract of insurance or guaranty--

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financial assistance to any program or activity to issue rules, regulations, or orders for carrying out the provisions of the act.

Federal departments and agencies have developed regulations pursuant to the act and have published them in the Federal Register. Most of the departments and agencies have delegated authority, by means of interagency agreements, to HEW to conduct at least a part of their enforcement processes in elementary and secondary schools. The agreements generally delegate authority to HEW to conduct all the informal measures, including receiving periodic reports, conducting periodic reviews, receiving complaints, and conducting informal negotiations. However, most of the departments and agencies have reserved authority to initiate and conduct formal enforcement proceedings to themselves.

HEW regulations state that, for elementary and secondary schools, the requirements of title VI are satisfied by a school district when (1) it submits a voluntary desegregation plan which HEW determines adequate to accomplish the purposes of the act at the earliest practicable time and submits an assurance that the plan will be carried out or (2) it is subject to a final order of a court of the United States to desegregate and provides an assurance that it will comply with such order.

The regulations provide that, when there are indications that a school district may not be in compliance with title VI, OCR is to conduct an investigation. If the investigation indicates noncompliance, OCR is to notify the school district in writing of the particular areas of noncompliance and then is to make every reasonable effort to achieve compliance by the district through negotiation. When OCR determines that compliance cannot be achieved by voluntary means, it may initiate either formal administrative proceedings for termination of the school district's Federal financial assistance or may refer the matter to the Department of Justice with a recommendation for appropriate legal action.

With respect to school districts, formal administrative proceedings under title VI require that, prior to termination of Federal financial assistance, a school district be given (1) a notice of opportunity for a hearing, (2) a formal hearing before an independent Federal hearing examiner, if requested, (3) an opportunity for a review of the hearing

examiner's decision by an HEW reviewing authority, and (4) the right of appeal to the Secretary of HEW and the U.S. Court of Appeals.

Provisions under ESAP

ESAP was established in August 1970, under six existing legislative authorities, to provide grants to school districts to defray the costs of meeting special problems arising from the desegregation of elementary and secondary schools.

The regulations require that as a condition to receiving a grant, a school district give certain formal assurances, some of which deal with nondiscrimination and others which deal solely with program matters. The assurances concerning nondiscrimination that a school district must give are that

- it has not engaged and will not engage in the transfer of property or services to any nonpublic school or school district which, at the time of such transfer, practices racial discrimination;
- it will not discriminate in the hiring, assigning, promoting, paying, demoting, or dismissing of teachers and other professional staff who work directly with children or who work on the administrative level, on the basis of their being members of minority groups;
- it will take effective action to assign teachers and other staff who work directly with children so that the ratio of minority to nonminority group teachers and staff in each school is substantially the same as the ratio in the entire school district; and
- it will not employ any discriminatory practices or procedures, including testing, in the assignment of children to classes or in carrying out other school activities.

If a grantee fails to abide by the signed assurances or fails to carry out its program in accordance with the regulations and terms and conditions of the grant, the grant may be terminated in whole or in part. However, only funds provided under ESAP, rather than all Federal financial assistance, is subject to termination. Formal administrative enforcement proceedings under ESAP require that, before termination of

financial assistance, a school district be given a notice of opportunity for a hearing and, if requested, a hearing before an independent Federal hearing examiner. The school district also has the right to appeal the decision of the hearing examiner to the Commissioner of Education.

ENFORCEMENT PROCEEDINGS STATISTICS AND BASIS  
FOR SELECTION OF CASES TO BE REVIEWED

From passage of the Civil Rights Act in 1964 through December 31, 1971, HEW initiated 545 formal administrative proceedings against school districts for violations of title VI. These proceedings resulted in termination of Federal financial assistance to 202 school districts. However, 201 districts subsequently complied, leaving only one district in a terminated status as of December 31, 1971. There were 71 administrative enforcement proceedings instituted against school districts under ESAP from inception of the program on August 18, 1970, through December 31, 1971, of which 23 concerned violations of the nondiscrimination assurances. These 23 enforcement proceedings resulted in termination of grant funds to six school districts.

We used as a universe from which to select title VI cases for review those formal administrative proceedings instituted after May 27, 1968--the date the Supreme Court rendered its decision in *Green v. County School Board of New Kent County, Virginia* (391 U.S. 430), declaring that the time to desegregate is now. A total of 201 title VI enforcement proceedings were instituted from May 27, 1968, through December 31, 1971. We classified the 201 title VI and the 23 ESAP enforcement proceedings, according to their final disposition or their stages in process as of December 31, 1971, into categories which coincided with the various steps of the administrative proceedings as provided for by HEW regulations and procedures.

To provide a basis for evaluating HEW's adherence to as many of the established administrative enforcement proceedings as possible, we then selected for review 20 title VI and 12 ESAP cases which had proceeded furthest through the enforcement action, rather than selecting cases from each category. (See enclosures I and II.)

## TITLE VI ENFORCEMENT PROCEEDINGS

Regulations developed by HEW in accordance with the Administrative Procedure Act (5 U.S.C. 554-557) require that HEW initiate formal administrative enforcement proceedings only after it has determined that compliance cannot be achieved by informal means. For the 20 cases we reviewed, the length of time HEW attempted to obtain voluntary compliance before formal administrative proceedings began ranged from 15 to 48 months and averaged 33 months.

The established steps of the formal administrative enforcement proceedings under title VI and the results of our review of HEW's adherence to them follow.

### Notice of opportunity for hearing

The regulations require that an applicant for or recipient of Federal funds shall be given notice of an opportunity for a hearing by registered by certified mail. The notice may either (1) give the applicant or recipient not less than 20 days after the date of the notice to request that a hearing be scheduled or (2) state that a hearing has been scheduled at a specified time and place, subject to change for cause. If a school district fails to request a hearing or to appear at a scheduled hearing, it waives the right to a hearing and a decision is made on the basis of the information available.

Although all 20 school districts were given 20 days to request hearings, three districts did not reply to the notice, and decisions of noncompliance were made on the basis of the information available. Of the remaining 17 districts, 12 requested hearings within the 20 days, one requested and received an extension of time to file a request, and four requested hearings from 2 to 13 days after the 20 days had expired. These requests were granted.

According to HEW, the legislative record indicates that the Congress, in enacting the Civil Rights Act, intended to preserve the status quo during the hearing period. Therefore, at the time a school district is notified of its opportunity to request a hearing, HEW takes the following actions on applications of the district for Federal program funds.

For applications for new program funds, the status quo is maintained by deferring action until the compliance status

of the district is determined. For applications for funds to support ongoing or continuing programs, action is not deferred if the activities involved are substantially the same as those conducted in the programs during the prior year. However, if new activities are contemplated or the old activities are of increased size or scope, then approval of such new or expanded activities is deferred and those portions of the programs which remain substantially unchanged are authorized to continue.

The enactment of section 182 of the Elementary and Secondary Education Amendments of 1966 (42 U.S.C. 2000d-5) established specific time frames within which certain actions regarding deferral had to be taken. This section states that the Commissioner of Education shall not, because of alleged noncompliance with title VI, defer action or order action deferred on any application by a school district for more than 60 days after notice of such deferral has been given unless the district is given an opportunity for a hearing. The hearing must take place within 60 days unless the time for the hearing has been extended by mutual consent of the district and the Commissioner. In addition, deferral cannot continue for more than 30 days after the close of a hearing unless there is an express finding on the record that the school district is in noncompliance with title VI. (For purposes of deferral of funds, HEW has interpreted the close of a hearing as the date on which the final brief is submitted to the hearing examiner.)

#### Hearing by independent hearing examiner

Hearings are held in accordance with the Administrative Procedure Act and HEW regulations and are presided over by Federal hearing examiners drawn from a national pool of Civil Service Commission appointees who are attorneys. After the oral hearing, briefs containing proposed findings of fact and conclusions of law are filed by both parties. Replies to the briefs also may be filed. The hearing examiner, after reviewing the transcript of the hearing and the briefs and reply briefs filed, renders an initial decision. The hearing examiner must render an initial decision within 30 days of the date of the last brief to be within the prescribed deferral period. If the hearing examiner finds that the school district is in noncompliance with title VI, the deferral order remains in effect until final completion of the enforcement proceedings. If the hearing examiner finds that the district is in compliance, the deferral is lifted.

Our analysis of the 17 cases which had had hearings showed that in two cases HEW extended the deferrals beyond the prescribed 60-day period by 1 day and 5 days without obtaining the consent of the districts and that in 15 cases the deferrals were within the prescribed or extended periods mutually agreed to by the parties. With regard to continuing the deferral for no more than 30 days beyond the close of a hearing unless there was an express finding of noncompliance on the record, our analysis showed that in five of the 17 cases the deferral periods were extended beyond the 30 days either by the hearing examiner or by mutual consent of the parties, in one case the deferral was lifted until there was a finding of noncompliance on the record, and in the other 11 cases the deferrals were within the prescribed 30-day period.

The regulations provide that, after the hearing examiner issues an initial decision, either party to the hearing may file an exception to the decision within 20 days and that any party may file a response to an exception within 30 days after the decision. The regulations provide also that, if no exceptions are filed within the prescribed time, the hearing examiner's initial decision will become the final decision of HEW.

In 12 of the 17 cases which had hearings, exceptions generally were filed within the 20-day period or within the time extensions granted and in five the initial decisions of noncompliance became final because no exceptions were filed. Responses to the exceptions were generally filed within the prescribed 30-day period or within the extensions of time granted.

#### Appeal to HEW reviewing authority

The regulations provide that, if exceptions to the initial decision are filed, the decision will be reviewed by a reviewing authority, which will issue a final decision. A reviewing authority was established by the Secretary of HEW in November 1967 to review initial decisions when exceptions were filed. It originally consisted of three members appointed by the Secretary, but in May 1969 the membership was increased to no more than five members. At December 31, 1971, there were four members.

The authority, which meets on the average 2 days a month, comprises practicing attorneys, law professors, or college deans, who are generally appointed for terms of 1 year and are

compensated at the same rates as consultants for HEW. No time limitations are imposed on the authority for rendering a decision, and because there may be several cases before it at one time, all at different stages of review and with varying degrees of complexity, a decision may take several months.

According to the regulations, a final decision may provide for termination of Federal financial assistance, in whole or in part, for the program or programs involved. It may also contain such terms, conditions, and other provisions as are considered necessary to carry out the purposes of the Civil Rights Act.

For the 12 cases in which exceptions were filed, the authority took an average of 180 days, or about 6 months, to render a decision--as few as 73 days on one case and as many as 293 days on another. This time lapse included the prescribed time allowed to file responses to the exceptions. The authority affirmed the initial decisions of noncompliance in nine cases and overturned the initial decisions of compliance in the other three.

In addition, the authority, in accordance with the regulations, rendered decisions of noncompliance on the basis of the available information in three cases because the school districts did not respond to the notices of opportunity to request a hearing. As already indicated, five initial decisions of noncompliance became final because no exceptions were filed.

In nine of the 20 cases the school districts complied without any further administrative action taking place beyond the reviewing-authority level because the districts either adhered to final court orders or submitted voluntary desegregation plans acceptable to HEW. As discussed on page 2, this action constitutes compliance with the title VI regulations.

#### Appeal to Secretary of HEW and to the courts

The regulations provide that, within 20 days after a final decision is rendered, a school district may request the Secretary of HEW to review the decision. The Secretary may also choose to review the decision on his own. The regulations provide also that a school district has the right to judicial review of any Department or agency decision.



According to HEW, none of the 201 cases included in our universe had been granted a review by the Secretary or had had a judicial review as of December 31, 1971. This statement was confirmed for the 20 cases we reviewed.

Report of termination filed with  
congressional committees

After a final decision of noncompliance is on the record and the school district still has not complied voluntarily, the case proceeds to termination of financial assistance. However, the Civil Rights Act requires that, before any termination order can become effective, a full written report on the circumstances and grounds for termination be filed with the committees of the House and Senate having legislative jurisdiction over the programs involved. For HEW these are the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare. HEW also sends the reports to the House and Senate Government Operations Committees because of their oversight responsibilities for intergovernmental relations. The act states that termination will not be effective until 30 days after the report has been filed with the committees.

In the 11 of 20 cases that had further administrative action beyond the reviewing-authority level, final decisions of noncompliance were made and notifications of termination of assistance were sent to the Committees. Although there is no time requirement within which the notification must be sent to the Committees, our analysis showed that the time ranged from 6 to 103 days, except for one case which took 295 days. HEW officials could not provide us with a reason why the Secretary had waited the 295 days in this case.

Of the 11 termination notifications, compliance was achieved by four school districts prior to the effective dates of termination. One did so by assuring that it would comply with a final court order, and the other three by submitting acceptable desegregation plans to HEW and assuring that they would abide by the plans. When compliance was achieved in these four cases, the Secretary officially withdrew the termination orders from the Committees.

For the remaining seven school districts, the termination orders became effective after the 30-day period provided for in the act--financial assistance was terminated for two during calendar year 1968, for three during 1969, and for two during 1970.

A district's eligibility to receive Federal financial assistance, however, may be restored if (1) it satisfies the terms and conditions which were included in the final decision, (2) it takes action to comply with title VI and provides assurance that it will continue to comply, or (3) it subsequently becomes subject to a final court order or submits an acceptable desegregation plan to HEW and provides reasonable assurance that it will comply with the court order or plan.

All seven districts subsequently complied--four because they came under Federal court orders and three because they submitted voluntary desegregation plans acceptable to HEW which eliminated the violations cited in their termination orders. All seven districts also provided assurances that they would comply with their court orders or plans. The length of time that Federal financial assistance for the districts was in a terminated status ranged from 6 to 445 days.

#### ESAP ENFORCEMENT PROCEEDINGS

According to HEW, termination proceedings under ESAP were designed to be conducted on an expedited basis in view of the limited timespan of the program and the need to bring grantees into compliance as promptly as possible or, where compliance could not be achieved, to promptly terminate the grantee's opportunity to commit grant funds. The proceedings begin with a letter being sent to the grantee by OE advising the grantee of an apparent failure to abide by the terms and conditions of the grant and the statutory or regulatory basis for that requirement. The letter advises the grantee also that its grant will be terminated as of a certain date, subject to a hearing and other procedures to which the grantee is entitled, and gives a proposed date and place for the hearing. OE's procedures provide that the hearing not be scheduled earlier than 15 days after the date of the letter.

In seven of the 12 cases we reviewed, OE set the dates for the hearings, and held them in five of these cases, from 1 to 7 days before the expiration of the 15-day period.

Hearings in ESAP termination cases, as in title VI cases, are conducted in accordance with the Administrative Procedure Act and are presided over by Federal hearing examiners. After the oral presentation both parties are required to submit to the hearing examiner within 10 days, unless the time is extended, proposed findings and conclusions of law and briefs in support thereof. The hearing examiner then renders an

initial decision, although there is no time limitation within which he must do so. Except for one brief submitted by a school district 30 days late, all briefs were filed within the prescribed or extended time and the hearing examiners rendered their decisions in an average of 32 days after the briefs were filed.

In accordance with the Administrative Procedure Act, the initial decision of the hearing examiner becomes the final decision of the Commissioner of Education without further proceedings unless there is an appeal to the Commissioner made in writing no later than 15 days after receipt of the initial decision or the Commissioner himself may elect to review a case. When the hearing examiner renders his initial decision against the school district, it is on notice that it is no longer authorized to obligate ESAP funds. Appeal to the Commissioner does not give the district the right to obligate additional funds, and the funds remain in a terminated status unless the Commissioner overturns the hearing examiner's initial decision. If the Commissioner reviews a case, his decision is the final decision of OE.

In the 12 cases, five initial decisions to terminate funding and two initial decisions to continue funding became final decisions of OE because no appeals were filed. In the remaining five cases, three initial decisions to terminate funding were appealed by the school districts and two initial decisions to continue funding were appealed by OE. All five appeals were made within the prescribed 15 days or within the extension periods granted.

The Commissioner of Education upheld one initial decision to terminate funding and one initial decision to continue funding, rendering his decisions about 5 months and 4 months, respectively, after they were appealed. As of June 30, 1972, he had not rendered decisions on the other three cases.

According to the ESAP grant terms and conditions, obligations incurred by a grantee prior to the effective date of termination are allowed to the extent they would have been allowed had the grant not been terminated. Therefore grantees can continue to obligate ESAP funds while the hearings are in process.

The effective dates of termination in all six cases were the dates of the initial decisions, and, as required by the grant terms and conditions, the terminations were effected by written notifications to the grantees from OE.

COORDINATION BETWEEN OCR AND OE UNDER  
TITLE VI AND ESAP ADMINISTRATIVE PROCEEDINGS

OCR has been designated the agency of HEW responsible for enforcement of title VI. However, since a school district's Federal financial assistance is not subject to deferral or termination during the informal negotiation period, there are no procedures for notifying the agencies of HEW of the progress being made by OCR with each district in achieving voluntary compliance. Coordination between OCR and other agencies of HEW becomes imperative when it has been determined that compliance cannot be achieved by informal means and formal enforcement procedures are instituted against a school district because, at that time, Federal financial assistance is subject to deferral and possible termination. It is at this point that coordination begins.

When the notice of intention to initiate formal enforcement proceedings is sent to a school district, the name of the district is placed on an "HEW Status of Title VI Compliance, Interagency Report" prepared by OCR. This report, which is revised as often as necessary to reflect changes, includes the names of all school districts which are under formal administrative enforcement proceedings at a given point in time and gives the status of each case.

The report is sent to all agencies of HEW and states that the agencies are to defer action on the approval of applications for new or expanded activities submitted by any school district shown in the report unless it is specifically noted that deferral has been lifted. From this report, any agency of HEW, including OE, can identify and readily ascertain the current status of any school district under title VI administrative proceedings.

Under ESAP, OE is responsible for program administration; however, OCR assists OE by monitoring the compliance of school districts with their nondiscrimination assurances. When OCR finds violations of these assurances, a letter is prepared for the signature of an OE official advising the district of the apparent violations and of formal enforcement proceedings that are being instituted against it. OCR is furnished a copy of the letter sent to the school district. Therefore both OE and OCR are aware of all school districts under administrative enforcement proceedings and the nature of the violations involved. Since OE is a party to all ESAP administrative proceedings, it is also aware of the current status of each case.

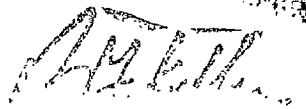
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Accordingly, we believe that adequate procedures exist for coordination between OCR and OE in title VI and ESAP administrative proceedings.

HEW officials have not been given an opportunity to formally comment on the matters discussed in this report. We plan to make no further distribution of this report unless copies are specifically requested, and then we shall make distribution only after your agreement has been obtained or public announcement has been made by you concerning the contents of the report.

Sincerely yours,

Deputy

  
Comptroller General  
of the United States

Enclosures

The Honorable Lawrence J. Hogan  
House of Representatives

STATUS OF HEW ADMINISTRATIVE ENFORCEMENT PROCEEDINGSINSTITUTED AGAINST SCHOOL DISTRICTS UNDER TITLE VIOF THE CIVIL RIGHTS ACT OF 1964MAY 27, 1968, THROUGH DECEMBER 31, 1971

	<u>Total number</u>	<u>Number in sample</u>
Notice of opportunity for hearing	<u>8</u>	<u>-</u>
Compliance achieved without hearing	<u>63</u>	<u>-</u>
Hearing conducted by independent hearing examiner (note a):		
Compliance achieved before hearing examiner's decision	38	-
Decision pending	3	-
Decision held for HEW	3	-
Decision held for school district	2	-
Compliance achieved after hearing examiner's decision	<u>17</u>	<u>-</u>
Total	<u>63</u>	<u>-</u>
Appeal of hearing examiner's decision to the reviewing authority (note b):		
Compliance achieved before reviewing authority's decision	35	-
Decision pending	8	-
Decision held for HEW	2	-
Decision held for school district	1	-
Compliance achieved after reviewing authority's decision	<u>10</u>	<u>9</u>
Total	<u>56</u>	<u>9</u>
Appeal of reviewing authority's decision to Secretary of HEW or U.S. Court of Appeals	<u>-</u>	<u>-</u>
Appeal of Secretary's decision to U.S. Court of Appeals	<u>-</u>	<u>-</u>
Report of final decision filed by HEW with congressional committees (note c):		
Compliance achieved after filing of final decision with committees	4	4
Federal funds terminated but subsequently reinstated (note d)	<u>7</u>	<u>7</u>
Total	<u>11</u>	<u>11</u>
Total enforcement actions taken	<u>201</u>	<u>20</u>

<sup>a</sup>Hearing examiners are drawn from a national pool of Civil Service Commission appointees who are attorneys.

<sup>b</sup>Panel of not more than five members selected by the Secretary of HEW, comprising private citizens with legal backgrounds.

<sup>c</sup>Reports are filed with the Senate and House Government Operations Committees, the House Committee on Education and Labor, and the Senate Committee on Labor and Public Welfare.

<sup>d</sup>After their Federal funds were terminated, these school districts either voluntarily complied with title VI or were brought into compliance by the courts; thus their eligibility for Federal financial assistance was reinstated.

STATUS OF HEW ADMINISTRATIVE ENFORCEMENT PROCEEDINGS  
INSTITUTED AGAINST SCHOOL DISTRICTS  
UNDER THE NONDISCRIMINATION ASSURANCES  
OF THE EMERGENCY SCHOOL ASSISTANCE PROGRAM  
AUGUST 18, 1970, THROUGH DECEMBER 31, 1971

	<u>Total number</u>	<u>Number in sample</u>
Notice of opportunity for hearing	<u>1</u>	<u>-</u>
Compliance achieved without hearing	<u>3</u>	<u>-</u>
Hearing conducted by independent examiner (note a):		
Decision pending	2	-
Decision held for HEW	-	-
Decision held for school district	<u>7</u>	<u>2</u>
Total	<u>9</u>	<u>2</u>
Appeal of hearing examiner's decision to the Commissioner of Education:		
Decision pending	3	3
Decision held for HEW	-	-
Decision held for school district	<u>1</u>	<u>1</u>
Total	<u>4</u>	<u>4</u>
Program funds terminated	<u>6</u>	<u>6</u>
Total enforcement actions taken	<u>23</u>	<u>12</u>

<sup>a</sup>Hearing examiners are drawn from a national pool of Civil Service Commission appointees who are attorneys.